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CASE NO. 84-843

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RUDY DURAND and KOALA PRODUCTIONS, LIMITED,

Petitioners,

v.

SIMON PRODUCTIONS NO. 2, INC.; SIMON FILM PRODUCTIONS, INC.; MELVIN SIMON PRODUCTIONS, INC.; MELVIN SIMON; NATIONAL BROADCASTING COMPANY, INC.; WARNER BROS., INC.; VIACOM INTERNATIONAL, INC.; MYRON L. SLOBODIEN; LEROY BOBBITT; LOEB and LOEB; JOHN FRANKENHEIMER; RICHARD B. KAPLAN; and KAPLAN, LIVINGSTON, GOODWIN, BERKOWITZ and SELVIN,

Respondents.

PETITIONERS' REPLY BRIEF

TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESPONDENTS HAVE FAILED TO ARGUE THE ISSUE AS TO WHETHER OR NOT DURAND HAD THE CONSTITUTIONAL RIGHT TO SELECT AN ATTORNEY OF HIS CHOICE

Respondents mistakenly argue whether or not some anonymous attorney has a constitutional right to appear in Court on behalf of a client.

The issue is not the constitutional rights of a pro hac vice attorney, but the rights of Durand, the client to select an attorney of his choice, and to utilize the Federal Rules and Statutes.

Local Rule 1 of the district court states that unless authorized by the constitution of the United States or acts of Congress, an attorney is not eligible to practice pursuant to this paragraph B, if any one or more of the following apply to him: (i) He resides in California; (ii) He is regularly employed in California; (iii) He is regularly engaged in business in California.

Durand's attorney of choice, James Ortego, was a professor of law at Whittier College in California. He believed that because Durand would be acting in pro se and that Richard Haynes, Esq., of Houston, Texas, was lead counsel, the district court would allow Ortego under these special circumstances to collaborate with Durand and appear for the corporate plaintiff. James Ortego was initially approved by the District Court to represent Koala Productions. Subsequently, the District Court revoked its prior authorization, summarily, and without a hearing. (See Petitioners' Reply Memo, Ninth Circuit, regarding amicus memo dated July 31, 1981, particularly pages 1, 2, and 3.)

On page 10 of Respondents' brief in opposition, they state in effect that immediately after Mr. Ortego was denied admission, Petitioners rushed in with motions to the district court which failed to challenge the constitutionality of Local Rule 1. First of all, Mr. Ortego was not denied admission, he had been

approved due to special circumstances after having made full disclosure to the district court of his residency and employment in California and in fact represented Koala Productions for over a month in the District Court. Respondents' callous accusations on pages 6 and 7 of their brief in opposition herein are not true.

On page 2 of Respondents' Brief in Opposition, they extend their deliberate mischaracterization of the record by stating that Petitioners do not claim that either of the lower courts misinterpreted the law or misunderstood the facts of this case. Again, the actual record when considered as a whole defeats Respondents mischaracterization and continued attempts to avoid the issues.

In response to Respondents' misstatements that Durand did not assert that either the District Court or the Ninth Circuit Court of Appeals misinterpreted the law or misunderstood the facts of this case, Petitioner Durand invites the Court's attention to the following:

1. Petitioners' Opening Brief to the Ninth Circuit Court dated October 28, 1983, pages 32 and 33, paragraphs 2, 3, and 4, and page 16, inclusive.

2. Petitioners' Reply Brief to the Ninth Circuit Court dated September 27, 1984, at pages 8 and 9, paragraphs 1, 2, and 3, thereof.

3. Petitioners' Petition for Rehearing En Banc to the Ninth Circuit Court dated June 22, 1984, at pages 7 through 14, and Exhibits thereto, which include the comprehensive and fully briefed new matters tried by Petitioners and not answered, objected to or denied, by Respondents which more than sufficiently state a proper Lanham Act violation.

Therefore in truth and in fact the records show that Petitioners continually challenged both lower courts interpretations of the law and facts of the case.

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CONTRARY TO RESPONDENTS' ASSERTIONS, DURAND CONSTANTLY CHALLENGED THE CONSTITUTIONALITY OF LOCAL RULE 1 IN THE LOWER COURTS

Respondents in the opposition brief continue to mischaracterize the record to a degree that now borders on perpetrating a fraud on this Court. On page 10 of said brief, Respondents baldly assert that Petitioners made no challenge to the constitutionality of Local Rule 1 in either court. Then what was it that the Ninth Circuit Court referred to in its order dated August 27, 1981, (see Exhibit B to Petition)wherein that court on page 2, paragraph 6 thereof, stated that having determined that Petitioners' mandamus have not presented their challenge to the constitutionality of Central District Rule 1 to the District Court, we decline to address the issue. What issue? If not Petitioners' challenge to the constitutionality

of Local Rule 1, which was the basis of Petitioners' Writ of Mandamus and/or Prohibition, then what issue? See Ninth Circuit Court's response to Petitioners' Writ of Mandamus, Ninth Circuit Court order dated May 20, 1981, page 1, paragraph E thereof, wherein the Ninth Circuit Court stated the amicus curiae memo shall discuss the validity of Local Rule 1 of the District Court of the Central District of California. More importantly, the Ninth Circuit ordered that a copy of said order be served upon the interested district judge. The order was so served. What validity was the Ninth Circuit Court referring to, if not the constitutional validity of Local Rule 1? Therefore by ordering an amicus, the Ninth Circuit caused Petitioners to make the challenge below.

The result of the Ninth Circuit Court's order as to the amicus was that, after nearly a year of endless pleadings, Petitioners never saw the light of day on the constitutional issues. The Ninth Circuit Court's two judges, the

Honorable Goodwin and Ferguson, who originally considered Petitioners' Writ of Mandamus, ordered what resulted in that year's multiplicity of proceedings, directly related to Petitioners' challenge. Subsequently they were somehow replaced by two other judges, the Honorable Wallace and the Honorable Boochever. These new judges and their order of August 27, 1981, denied Petitioners' Writ of Mandamus stating, (a) "Petitioners have not demonstrated a clear and indisputable right to disqualification. The alleged bias of the trial judge pertains primarily only to adverse trial rulings." Petitioners' have experienced a species of death in these four years of outrageously ill-flated efforts to be heard on the actual merits of their submissions. Petitioners have made one of the clearest cases against the lower court's trial judge for obvious and continuing hostility toward Petitioners and improper subsilentio maneuvers. See Petitioners' Ex-Parte Emergency Motion for Relief, FRPC60, May 27, 1981, District Court.

Where were the Honorable Wallace and Boochever's considerations as to the amicus curiae brief ordered months before by the Honorable Goodwin and Ferguson. After months of Petitioners' submissions, responses, replies, and supplemental submissions, all of that effort was completely wasted.

Time ran out while Petitioners battled in the District Court to get a hearing on the constitutional challenge they had made in the District Court months before. The District Court avoided the issue. Instead, the District Court resurrected Petitioners' motion for relief from order (60B), which had been denied by one district judge, but reclassified as a motion for reconsideration by District Court Chief Judge Hauk. Said Chief Judge set that motion for hearing on September 28, 1981, as a motion for reconsideration of Petitioners' claim as to the bias of Judge Marshall, and the unconstitutionality of Local Rule 1. The transcript of that hearing speaks for itself.

See Reporter's Transcript of said hearing dated September 28, 1981. Judge Hauk refused to allow either Ortego or Durand to be heard. He vilified Ortego, banished him from the gallery of the court under threat of incarceration, and then proceeded to chastise Durand, ordering from the bench that the clerk of the court no longer accept any further submissions by Petitioners that in any way related to the disqualification of the trial judge or to Local rule 1. A few days later, on September 30, 1981, the Ninth Circuit Court came down with an order and response to Petitioners' emergency writ of mandamus and prohibition filed September 25, 1981.

Time ran out, Petitioners were denied the right to be heard on the issues despite the fact that it was the Ninth Circuit Court that had months before ordered a full briefing by Petitioners as to that issue, and an amicus curiae brief regarding the validity of the Central District Local Rule.

In view of the record as outlined above, Respondents claim that Petitioners' never challenged the Constitutionality of Local Rule 1 in the lower Courts evidences a misstatement of the record and facts to this Court by the Respondents.

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CONTRA TO RESPONDENTS' ARGUMENT,
THE LANHAM ACT DOES APPLY AND THEREFORE
THERE IS FEDERAL JURISDICTION

Respondents assert that a strict reading of the Lanham Act demonstrates that such act is not applicable to this action, as Durand approved and helped market the only version released, the unauthorized Warner version. Respondents, however, admit in their brief that Durand has asserted all along that his apparent approval of, and aid in, the marketing of the released version of the film, was the result of fraud and misrepresentation. Respondents then conclude

that such alleged fraud and misrepresentation must be ignored, as irrelevant, and that only the result - Durand's supposed approval and marketing efforts - must be looked at in relation to the wording of the Lanham Act.

Durand respectfully submits that Respondents' assertion makes a farce of the Act, or any other law or acts, as they are asserting, incredulously, that one can use ones own fraud and misrepresentation to circumvent the clear purpose of a law, in this case, the Lanham Act. It is hardly necessary to cite cases to the Court for the propositions that:

1. One should not, indeed cannot, benefit by their own fraud,

2. If consent is given under fraudulent circumstances, such fraud acts to vitiate the consent given by the innocent party.

The facts upon which Durand's claim of fraud and misrepresentations are based are as follows:

Respondents at the time were aware of Mr. Durand's proposed breakdown of changes, including

a new continuity as to story-line and character presence he intended to prepare. Mr. Durand proposed that major sequences be eliminated, the story-line be redefined, and the presence of lead characters be shifted as to importance and introduction in the film.

Respondents replied to Mr. Durand's proposed changes by closing his cutting rooms without any prior notice. Thereafter, they invoked the illusory Warner Bros. distribution agreement, which they alleged set forth certain demands relating to overriding creative control and editorial supervision of the film.

The die was cast. The doors were closed, and the gun remained at Mr. Durand's head, all the result of fraud in the inducement.

Durand was lead to believe that there would never be any other version of his film but the Warner version. They told Durand that a six million dollar distribution with Warner Bros. would be jeopardized if Mr. Durand did not do an about face and cooperate.

As Mr. Durand said very clearly in his complaints, he went out to those six or so cities and did his "tap dance", not to his own tune, but to the tune of the Respondents.

Respondents, and all of them had the opportunity after Durand learned of the fraud and demanded his final cut, to state at that time any and all of the objections and defenses they now present to this court. Respondents know or should know that their defenses and objections are unfounded because there would have been no Durand version if Respondents had denied Durand his contractually authorized final cut of the picture. Upon completion and delivery, the clearly different Durand version became the only contractually authorized version of the motion picture "TILT". This final version was the version Durand, as the designated person pursuant to his contract and pursuant to the Directors Guild Agreement, chose to be the last version of the film. After delivery, he no longer had any control over the final version, when the

Respondents substituted the Warner version for Durand's contractually authorized final cut of the picture. Respondents made the substitution despite prior written notice and written demand by Durand that his final cut be the only version utilized for any further distribution, exploitation, and/or sale to television or pay cable anywhere in this country or in the world.

Petitioners further invite this Court to see Petitioners' Petition for Rehearing En Banc to the Ninth Circuit dated August 1, 1984, which was filed and served, but never heard.

In conclusion, Petitioners' position is that the lower courts' decisions in this case thus far have created new restrictions as to the Lanham Act. The door once opened by the Ninth Circuit Court which gave hope to all artists, directors, writers, actors, that at last they would be protected against misidentifications, misrepresentations or substitution of their artistic contribution and intent, may once again be closed.

CONCLUSION

This is a very appropriate case for the United States Supreme Court to review both as to the Constitutionality of Local Rule 1 as applied to Durand and as to the boundaries of the Lanham Act. Durand and numerous producers, directors, writers, and actors, within the Motion Picture Industry need this Court to set the standards as to these facts where such persons should be protected to the fullest extent when they assert a Lanham Act violation in the Federal Courts of this country.

For the foregoing reasons, Petitioners once again respectfully request this Court to grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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